93-482

No.

Supreme Court, U.S.
FILED
SEP 21 1993
OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

TERM, 1993

ROBERT M. WEICHERT,

Petitioner,

vs.

THOMAS C. RICHARDS, Administrator
Federal Aviation Administration and
National Transportation Safety Board,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT M. WEICHERT, PRO SE
Attorney for Appellant
46 Oswego Street
Baldwinsville, New York 13027
(315) 635-3224

JAMES A. BARRY
Attorney for Appellees
Enforcement Proceedings Branch,
AGC-310
Office of the Chief Counsel
800 Independence Avenue, SW
Washington, D.C. 20591

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner was deprived, in the court below, of rights protected by the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution by being prosecuted with a stale complaint, by failing to gain jurisdiction over petitioner, by failing a mandatory pre-requisite of a pre-suspension hearing, by proceeding with an improper order of revocation, by denying petitioner's motion for preclusion and suppression, failure of proof pursuant to §821.32, and failure of FAA Administrator to comply with §821.31 of the National Transportation Safety Board Rules of Practice In Air Traffic Procedure and the sentence was excessive.

2. Whether proof against petitioner was the result of illegal search and seizure in violation of the Fourth Amendment to the United States Constitution.

3. Whether the lower court lacked jurisdiction to hear and determine this matter.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED .....i-ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES .....iv-vi

TABLE OF APPENDIX vii

LIST OF ALL PARTIES TO THE PROCEEDING 1

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS 4-5

STATEMENT OF THE CASE 6-7

PETITION OF CERTIORARI- INTRODUCTORY PARAGRAPH 8

ARGUMENT 9-20

CONCLUSION 21-22

TABLE OF AUTHORITIES

STATUTES	PAGES
Fourth Amendment to the United States Constitution	4,17
Fifth Amendment to the United States Constitution	4,10
Sixth Amendment to the United States Constitution	5
Fourteenth Amendment to the United States Constitution	5
29 USC §1257 Act of June ____, 1988, 100th Congress, 2d Sess., ____ Stat. ____, c. _____; P.L. 100-352;	3
Art. III of the U.S. Constitution	3
§609 of the Federal Aviation Act of 1958	6,9
§821.33 NTSB Rules of Practices in Air Safety Proceedings	9
49 U.S.C.A. §1429(a)	11,13
Rule 4 Fed. R. Civ. Proc.	11

TABLE OF AUTHORITIES (CONT.)

STATUTES	PAGES
Rule 4 Fed. R. Civ. Proc., 28 U.S.C.A.	13
Subpar. ii subdiv. (c) (2)(c) Rule 4 Fed. R. Civ. Proc.	12
§609(a) Federal Aviation Act of 1958	13
§821.32 NTSB Rules of Practice in Air Safety Proceedings	13,17
14 C.F.R. 13.19(b)	14
§821.8 NTSB Rules of Practice in Air Safety Proceedings	15
Part 43 FAR	19
§821.31 NTSB Rules of Practice in Air Safety Proceedings	20

TABLE OF AUTHORITIES (CONT.)

CASES	PAGES
Board of Regents of State Colleges v. Roth, 408 U.S. 564, 566, 570, 92 S. Ct. 2701, 2705, 33 L.Ed. 2d 548 (1972)	10
U.S. v. Provo, 124 F. Sup. 185, revd on other grounds 215 F. 2d 531	13
2 NY Jur, Agency §1 et seq.	13
Pastrana v. U.S., 746 2d 1447 (1984 11th Cir)	14
FAA v. Weichert, Order SE8838 July 14, 1988	14

TABLE OF APPENDIX

PAGE

Formal Decision and Order .....A
by the U.S. Court of
Appeals for the Second
Circuit filed May 6,
1993 and issued as
mandate July 6, 1993,
rehearing denied June
25, 1993.

Formal Opinion and Order .....B
by the NTSB August 10,
1992.

LIST OF ALL PARTIES TO

THE PROCEEDING.

1. Robert M. Weichert, Appellant.

2. Thomas C. Richards, Administrator Federal Aviation Administration and National Transportation Safety Board, Appellees.

3. Solicitor General of the United States, because the interpretation provision of the United States Constitution is drawn in question and made by a federal agency and the Second Circuit Court of Appeals.

OPINIONS BELOW

1. There was an oral initial decision by Administrative Law Judge Jimmy N. Coffman dated May 23, 1990.

2. There was a formal decision and order rendered by the Second Circuit Court of Appeals filed May 6, 1993 and issued as mandate July 6, 1993, rehearing denied June 25, 1993 which is reproduced in appendix A of this petition.

3. There was a formal opinion and order rendered by the National Transportation Safety Board on August 10, 1992 which is reproduced in appendix B of this petition.

JURISDICTION

1. Date of entry of decision and order to be reviewed is May 6, 1993 and issued as mandat July 6, 1993, rehearing denied June 25, 1993.

2. The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question or writ of certiorari is 29 USC §1257 Act of June _____, 1988, 100th Congress, 2d Sess., _____ Stat. _____, c. _____; P.L. 100-352; Art. III of the United States Constitution.

CONSTITUTIONAL PROVISIONS

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"...the right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,..."

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"...nor be deprived of life, liberty, or property, without due process of law..."

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense..."

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"...no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This appeal arises out of the initial oral decision of Honorable Jimmy N. Coffman rendered orally May 23, 1990.

Prior to and at the hearing of May 23, 1990, appellant-petitioner made several motions to dismiss the charges brought against him by the FAA. It appeared from the complaint that the alleged offenses occurred in 1985, more than six months(5 years) prior to an alleged notification by the Administrator advising appellant-petitioner as to the reasons for the proposed action under §609 of the Act; that there was lack of jurisdiction because the notice of proposed certificate action was never served on appellant-petitioner, observation of the notice displays an erroneous address, and the certified mail receipt indicates that appellant-petitioner did not receive the

notice, and further, that the notice was not properly served; that the FAA failed to prove the mandatory pre-requisite hearing; that appellant-petitioner's motion for preclusion was improperly denied; that appellant-petitioner's motion for suppression was improperly denied and that the proof rendered by the FAA at trial was insufficient to meet their burden of proof, and or, the result of an illegal search and seizure.

In the subsequent itemized issues to be determined on this appeal, appellant-petitioner has set forth the specific facts on which each issue turns. Based upon these issues, appellant-petitioner prays for an order of this court reversing the decision of the Administrative Law Judge.

PETITION OF CERTIORARI-

INTRODUCTORY PARAGRAPH

The petitioner, Robert M. Weichert, respectfully prays that a writ of certiorari issue to review and reverse the mandate and decision of the Second Circuit Court of Appeals dated July 6, 1993, rehearing denied June 25, 1993, the National Transportation Safety Board dated October 3, 1989, and the initial decision of the Administrative Law Judge Jimmy N. Coffman rendered May 23, 1990.

ARGUMENT

STALE COMPLAINT

A. Complaint did not allege lack of qualification of appellant-petitioner.

B. Complaint alleges offenses occurring in 1985, more than 6 months (5 years) prior to the Administrator allegedly advising petitioner as to reasons for proposed action under §609 of the Act. §821.33 NTSB Rules of Practices in Air Safety Proceedings.

C. Appellant-petitioner has been prejudiced by the long delay of the FAA in that witnesses beneficial to appellant were no longer available. Records, especially as to recertification of parachute, were no longer available and memories of pertinent witnesses had dimmed.

D. No good cause was shown by FAA for the delay.

LACK OF JURISDICTION

Administrator failed to prove the jurisdictional question, as to their authority to revoke appellant's license, by failing to prove proper notice or service of process on appellant of the Order of Revocation, an affirmative defense raised in appellant's answer and preserved by his "special appearance" at trial.

Appellant's pilot certificate, a predicate to his employment as a pilot, is a cognizable property interest protectable by the procedural due process requirement of the Fifth Amendment to the U.S. Constitution. Appellant has a continuing legitimate claim of entitlement to the pilot certificate, and absent an extraordinary situation invoking an important governmental interest, is entitled to appropriate notice and hearing. Board of Regents of

State Colleges v. Roth, 408 U.S. 564, 566, 570, 92 S.Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972); 49 U.S.C.A. §1429(a).

Process is any paper whereby a person is subjected to a court's jurisdiction. Therefore, the type of service of process under 49 U.S.C.A. §1429(a) is that contemplated by Rule 4 of the Fed. R. Civ. Proc. for service of process in a civil action. Rule 4 proscribes personal service when possible, and also mandates service by a Marshal or a person appointed by a court. Appellant maintains he has always been available. The Administrator has appellant's personal residence address, phone number is not unlisted, but, at no time did the Administrator even attempt personal service, mailed the notice by certified mail, return receipt requested, but mailed the notice of revocation to an erroneous address (46 Orange Street). The

notice was not received by appellant-petitioner, but as the receipt clearly shows, and as Donna Seymour testified, she received and signed for the notice, not appellant-petitioner. The return receipt should have alerted the Administrator to defective service. No acknowledgement was ever made of service. Subparagraph ii of subdivision (c)(2)(c) Rule 4 of Fed. R. Civ. Proc. The answer and affirmative defense raised by appellant-petitioner in his pleadings should have alerted the Administrator to defective service, and the issue was preserved for trial. On trial, the Administrator offered no proof of notice or process, and/or made no connection of Donna Seymour to appellant-petitioner. The trial Judge's attempt to connect Donna Seymour as appellant-petitioner's agent to receive service for him was insufficient, misguided and ineffective. The fact that Seymour had

acted as notary on appellant's affidavit of mailing does not make her an agent to receive process. U.S. v. Provo, 124 F. Sup. 185, revd on other grounds 215 F. 2d 531; 2 NY Jur, Agency §1 et seq. Nor did service of the notice comply with Rule 4 of Fed. R. Civ. Proc., 28 U.S.C.A.

FAA HAS FAILED TO PROVE THE MANDATORY PRE-REQUISITE OF A PRESUSPENSION HEARING.

The presuspension hearing mandated under the Federal Aviation Act of 1958, §609(a), 49 U.S.C. §1429(a) FAA to give opportunity for hearing before an order takes effect. It is a prerequisite of proof at the subsequent NTSB hearing. §821.32 NTSB Rules of Practice in Air Safety Proceedings. No such proof was offered herein. Appellant-petitioner moved to dismiss the complaint on the grounds of such a failure, citing

Pastrana v. U.S., 746 2d 1447 (1984 11th Cir.), but was denied. The purpose of such hearing is not just to talk to one another. FAA v. Weichert, Order SE8838 July 14, 1988; 14 CFR §13.19(c).

LORETTA E. ALKALAY AND PATRICIA RABURN ARE NOT AUTHORIZED TO EXECUTE THE ORDER OF REVOCATION.

By Regulation, the authority of the FAA Administrator to issue such orders has been delegated to the Chief Counsel, the Assistant Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement and the Regional Counsel of the FAA. 14 C.F.R. 13.19(b). Loretta E. Alkalay, Assistant Chief Counsel for the Eastern Region did not sign nor does it appear she is even authorized and she cannot delegate to Patricia Raburn.

RESPONDENT'S MOTION FOR PRECLUSION WAS IMPROPERLY DENIED.

A. Demand for Interrogatories was served on Administrator March 30, 1990. A response was not received by appellant-petitioner until seven days before trial, on May 15, 1990, and further additional response was inadequate to answer appellant's demand. Interrogatories Nos. 5,6,8,11,12 and 13 were unanswered. The interrogatories were never properly served on appellant; the Administrator, relying on a private mail company, never contemplated under §821.8 Rules of Practice in Air Safety Proceedings.

B. James E. Cone failed to appear in response to subpoena for Examination Before Trial. He was served with a subpoena and notice May 8, 1990. He failed to appear. Motion for preclusion was made by appellant-petitioner on May 21, 1990 and May 23, 1990 which motion

was denied. The Administrator suffered no sanction or detriment due to the failure of James E. Cone to appear although his testimony was extensively used at trial.

APPELLANT'S MOTION FOR SUPPRESSION WAS IMPROPERLY DENIED.

Administrator denied ever being possessed of the parachute inspection card or the parachute, and yet, contained in the complaint is the serial number and date of "last" inspection, information that could have only been obtained by possession.

Appellant-petitioner alleges someone illegally and surreptitiously broke and entered a locked aircraft hangar and aircraft therein, to steal and carry away the parachute and card so that he could not prove its reinspection. The Administrator alleges that its proof will

be through Inspector Alborano, who entered upon private, not public property, Suburban Syracuse Airport, without a search warrant, who obtained his information through a routine search, and James E. Cone, who stated some forgery which was never established. No government inspector or law enforcement officer has the authority or right to enter private property and engage in a search without first obtaining a warrant to do so, unless they are part of an exempt class such as customs officers. Fourth Amendment, U.S. Constitution.

FAILURE OF PROOF-§821.32 NTSB RULES OF PRACTICE IN AIR SAFETY PROCEDURE.

A. PARACHUTE: James E. Cone says that he inspected it on May 17, 1985, and any authorized inspector could have reinspected thereafter. He had no

knowledge whether it was reinspected or not. Alborano testified he had no personal knowledge of the parachute.

The proof is not there, that on September 14, 1985 the parachute log card did not contain a recertification, and that the chute had not been reinspected. Exacerbating this problem is the five year delay by the Administrator in bringing this case to trial, and a denial by the Trial Judge of appellant's motion for continuance in order to give him time to find and serve a subpoena on Jerry Kessler, the rigger who reinspected the chute in September of 1985.

B. Alborano did not see the aircraft fly, and acknowledged that the aircraft could have been airworthy on dates of previous flight. Dates of alleged flight set forth in complaint were not proved. Alborano acknowledged that any admission by appellant of previous flight was for

test flight. Alborano acknowledges that appellant was not there at the ramp inspection, and yet Alborano relies on some admission. How could he obtain an admission of appellant who was not there and Alborano never saw him? He never observed appellant fly. Alborano makes Kimber, the I & A mechanic/inspector, an agent of appellant. This is clear error.

C. Daniel Taylor, FAA Safety Inspector, a qualified expert, states that Kimber, the I & A mechanic/inspector, acknowledged he accomplished work on the aircraft in question, and was required, under Part 43 FAR, to be entered in log books; that failure to do so was in violation, and yet no prosecution of him has ever been commenced by FAA, although demanded by appellant. Kimber testified to extensive work accomplished on the aircraft prior to inspection, making it airworthy. Had he made the proper entries and

certifications, there would be absolutely no ground for prosecution of appellant-petitioner.

D. Complete failure of jurisdictional issue, i.e. service of notice on appellant and affording the opportunity of presuspension hearing.

APPELLANT'S/PETITIONER'S MOTION TO DISMISS THE COMPLAINT FOR FAILURE OF ADMINISTRATOR/APPELLEE TO COMPLY WITH §821.31 NTSB RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS, IN THAT PROOF OF SERVICE UPON APPELLANT DID NOT ACCOMPANY THE COMPLAINT WHEN FILED WITH THE BOARD, WAS IMPROPERLY DENIED.

SANCTION WAS EXCESSIVE.

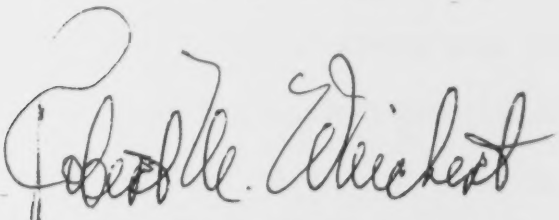
CONCLUSION

The actions and order of the Honorable Jimmy N. Coffman, rendered orally May 23, 1990, deprived appellant of due process, was the result of illegal search and seizure and was excessive and without jurisdiction. The argument of appellant herein justifies either a summary order of this court reversing, annulling and setting aside NTSB order number EA-3650 and the initial decision of Administrative Law Judge Jimmy N. Coffman dated May 23, 1990, or remanding this matter back to the Administrative Law Judge, or a certificate from this

court to the Administrative Law Judge for further review.

Dated: September 10, 1993.

Respectfully Submitted,



Robert M. Weichert, Pro Se
46 Oswego Street
Baldwinsville, New York 13027
(315) 635-3224
Attorney for Appellant

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed: May 6, 1993

Issued as Mandate: July 6, 1993

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Sixth day of May, 1993.

PRESENT: HONORABLE THOMAS J. MESKILL,
Chief Judge,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE JOHN M. WALKER,
Circuit Judges.

ROBERT M. WEICHERT,

Petitioner,

v.

THOMAS C, RICHARDS, Administrator,
Federal Aviation Administration,

Respondent.

"APPENDIX A"

Docket No. 92-4191

This is a pro se petition to review an order of the National Transportation Safety Board affirming the revocation by respondent Administrator of the Federal Aviation Administration of the commercial pilot certificate of petitioner, Robert Weichert.

This cause came on to be heard on the transcript of record from said Board and was taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the petition to review be and it hereby is DENIED because the Board's order is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 USC § 706(2)(A), for the reasons stated in the Opinion and Order adopted by the Board on August 10, 1992.

THOMAS J. MESKILL, Chief Judge

LAWRENCE W. PIERCE, U.S.C.J.

JOHN M. WALKER, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York on the 25th day of June, 1993.

ROBERT M. WEICHERT,

Petitioner,

v.

THOMAS C. RICHARDS,

Respondent.

Docket No. 92-4191

Filed: June 25, 1993

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by pro se petitioner, Robert M. Weichert,

Upon consideration, by the panel that decided the appeal, it is

ORDERED, that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Elaine B. Goldsmith, Clerk by
Carolyn Clark Campbell,
Chief Deputy Clerk

Served: August 26, 1992

NTSB Order No. EA-3650

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

ADOPTED BY THE NATIONAL TRANSPORTATION SAFETY BOARD at its office in Washington, D.C. on the 10th day of August, 1992.

THOMAS C. RICHARDS,
Administrator,
Federal Aviation Administration,

Complainant,

v.

ROBERT M. WEICHERT,

Respondent.

Docket No. SE-10612

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Jimmy N. Coffman issued in this proceeding on May 23, 1990, at the conclusion of an evidentiary

hearing.(f.n.1) By that decision the law judge affirmed an order of the Administrator revoking respondent's

---

1. An excerpt from the hearing transcript containing the initial decision is attached.

---

commercial pilot certificate on allegations that he violated sections 91.15(a), 47.3(b), 91.27(a)(1) and(a)(2), 91.29(a), 91.30(a), 91.165 of the Federal Aviation Regulations ("FAR"),14 C.F.R. Parts 47 and 91. (f.n.2)

---

2. FAR §§ 91.15(a), 47.3(b), 91.27(a)(1) and (2), 91.29(a), 91.30(a), and 91.165 provided in relevant part at the time of the allegations as follows:

"§ 91.15 Parachutes and parachuting.

(a) No pilot of a civil aircraft may allow a parachute that is available for

emergency use to be carried in that aircraft unless it is an approved type and...it has been packed by a certificated and appropriately rated parachute rigger within the preceding 120 days...

§ 47.3 Registration required...

(b) No person may operate an aircraft that is eligible for registration under section 501 of the Federal Aviation Act of 1958 unless the aircraft...Has been registered by its owner...

§ 91.27 Civil aircraft: Certifications required.

(a) Except as provided in §91.28, no person may operate a civil aircraft unless it has within it the following:

(a)(1) An appropriate and current airworthiness certificate...

(a)(2) A registration certificate issued to its owner.

§91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

§ 91.30 Inoperable instruments and equipment for multiengine aircraft.

(a) No person may take off a multiengine civil aircraft with inoperable instruments or equipment...

§ 91.165 Maintenance required.

Each owner or operator of an aircraft shall have that aircraft inspected as prescribed in §§ 91.169, 91.171 and 91.172...In addition, each owner or

operator shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating that the aircraft has been approved for return to service."

Respondent contends on appeal that the law judge's initial decision and order should be reversed, as it is not supported by a preponderance of the evidence and because the proceedings are defective on several procedural grounds. The Administrator has filed a brief in reply, urging the Board to affirm the initial decision and order.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's revocation order. For

the reasons that follow, we will deny respondent's appeal.

The gist of the Administrator's complaint is that respondent operated a DeHavilland DHC-2 Beaver aircraft on more than one occasion for the purpose of transporting parachutists, when that aircraft was unregistered, uninspected, and unairworthy. The evidence presented by the Administrator established that respondent bought the DeHavilland at a Sheriff's sale in 1982 for $9,500. The plane was not, in its previous owner's words, in "flyable" condition at the time of the sale. (f.n.3) Respondent employed a certificated airplane mechanic who performed repairs and maintenance on a regular basis, but the mechanic testified that he never performed an annual inspection on the aircraft.

3. According to the FAA inspector who testified, the last time the aircraft was seen by an FAA inspector it was "in parts", and there is no record of when it was re-assembled, or by whom.

According to the aircraft logbook, the last annual inspection was performed on this aircraft in 1980.

On October 2, 1985, an FAA airworthiness inspector performed a ramp inspection of the aircraft.(f.n.4) The inspector

4. Respondent contends that the "evidence," i.e., the inspector's observations during the ramp inspection, should have been excluded because the inspector did not have a search warrant to conduct the inspection. Respondent fails to cite any legal authority in support of this contention, and the Board

(f.n.4. Cont.)is unaware of any legal precedent requiring an extension of Fourth Amendment protections to the gathering of evidence used in FAA enforcement proceedings.

---

discovered multiple unairworthy conditions, and he immediately placed a condition notice on the aircraft informing respondent not to operate the aircraft without correcting those conditions. According to the testimony of more than one skydiver, respondent nonetheless operated the aircraft on at least two occasions subsequent to the ramp inspection, in complete disregard of the condition notice. The investigating FAA inspector also testified that the pilot's reserve parachute had not been inspected within 120 days, according to the tag on the parachute, which he examined on October 2, 1985. Respondent's

aircraft mechanic testified that he saw the condition notice and that he did not disagree with any of the inspector's observations.

Respondent produced only one witness, his former secretary, who claims that, notwithstanding the inspector's testimony that the parachute he inspected showed that the last inspection was in May, 1985, this parachute had been recertified in August, 1985.(f.n.5)

---

5. The secretary testified that the parachute was inspected by a certificated rigger named Jerry Kessler. However, the rigger who testified on behalf of the Administrator stated that he knows Kessler very well, and that Kessler is not, and never has been, a rigger.(TR-84). Thus, respondent's assertion that the delay between the alleged offenses

(f.n.5.Cont.) and the service of the notice of proposed certificate action prevented him from presenting Kessler's testimony, because he is now "unavailable," is unpersuasive, because Kessler's testimony would have been irrelevant.

Respondent also claims that before the hearing in this matter, "someone" stole the parachute and reinspection card with the subsequent annotation. However, the FAA inspector saw only one date on that card, May, 1985, when he examined the card in October, 1985.

She also claims she sent a piston out for overhaul and repair in late August, 1985, which precluded the operation of the aircraft on subsequent dates. (f.n.6) The law judge rejected the secretary's testimony as not credible.(f.n.7)

6. This witness also testified that in October, 1989 she no longer worked for respondent but for Susan Weichert, whose relationship with respondent is not explained in the record, but whose business address is the same as respondent's. In any event, the witness testified that she received and signed for the Order of Revocation issued by the Administrator, which she then gave to respondent.

7. According to the parachute rigger who inspected the parachute in May, 1985, respondent called him on the day of the ramp inspection and told him he had forged his signature on the registration card, and asked him to annotate his logbook accordingly. The rigger declined to do so, and informed the FAA.

We concur, and therefore we will adopt the law judge's factual findings as our own. Accordingly, we reject respondent's contention that the Administrator failed to establish the allegations by a preponderance of the evidence.

We turn next to the procedural issues raised on appeal. First, respondent contends, the Administrator's complaint should have been dismissed as stale, because the offenses alleged occurred more than six months from the date of the Notice of Proposed Certificate Action. As the Administrator points out in his reply brief, a complaint is not dismissible under the Board's stale complaint rule where the allegations presented in the complaint raise an issue of lack of qualifications. See C.F.R. 821.33(b)(2). Under the circumstances presented in this particular revocation order, we entertain

no doubt that, if true, they presented the issue as to whether respondent lacked the care, judgment and responsibility to hold an airman certificate.

Respondent's assertion that service of the complaint was defective is also unavailing. Neither the Federal Rules of Civil Procedure, relied on by respondent, nor the Board's Rules of Practice control service of the Administrator's orders, and there is no requirement for personal service of the complaint. Administrator v., Hamilton, NTSB Order No. EA-2743 at 8 (1988). Thus, service of the complaint to respondent's address of record, where it was signed for by a secretary who used to work for respondent and who still works in the same building, and who actually delivered the complaint to him, as she had done with other mail on more than one occasion, must be evaluated in

terms of general law principles. Administrator v. Heinberg, 5 NTSB 917, 918 (1986). We find that the service here constitutes at least constructive service of the complaint on respondent. Administrator v. Hayes, 1 NTSB 1693 (1972), aff'd mem., Hayes v. National Transportation Safety Board, 477 F.2d 450 (D.C. Cir. 1973).(f.n.8)

Respondent also contends that the proceedings should be dismissed because he was not provided with a "mandatory pre-suspension hearing," citing Pastrana v. United States, 746 F.2d 1447 (11th Cir. 1984). Pastrana is inapposite. That case involved the suspension of an airman certificate by an FAA inspector, who seized the certificate immediately after a ramp inspection. Section 609(a) of the Federal Aviation Act, 49 USC App. section 1429(a) requires that the holder of a

certificate be provided an opportunity to answer any charges and be heard as to why the certificate should not be amended, modified, suspended, or revoked, before that certificate action is taken. That opportunity to be heard at the agency level, before issuance of the order, is given when an airman is offered an informal conference with FAA counsel.

---

8. Respondent also argues that the complaint should be dismissed as it was not accompanied by proof of service upon respondent when filed with the Board. See 49 C.F.R. § 821.31(a). Respondent's contention is erroneous. The complaint contained in the Board's file in fact contains the requisite proof of service.

Oceanair of Florida v. National Transportation Safety Board, 888 F. 2d 757, 769 (11th Cir. 1989); FAR section 13.19(c).(f.n.9) In this case, respondent was afforded the opportunity to meet with FAA counsel in an informal conference, and, according to the Administrator's order, an informal conference in fact occurred on February 22, 1989. Respondent's claim, therefore, is without merit. Respondent asserts that the Administrator should have been precluded from presenting certain evidence because his response to respondent's requests for discovery did not comply fully with respondent's demands. The Board's Rules of Practice, specifically 49 C.F.R. section 821.19, provides for the exchange of information by parties. The Rule also provides that, in the event of a dispute, the law judge may issue an order directing compliance with any ruling he

has made in respect to discovery. Thus, respondent's remedy was to file a motion with the law judge,

---

9. FAR §13.19(c) also provides that the Administrator's order may be issued by, among others, the Regional Counsel concerned. The Board has recognized that a staff attorney may sign an order issued in the name of and under the authority of the Regional Counsel. See, e.g., Administrator v. Smith, 3 NTSB 3942, 3943 (1981), citing Administrator v. Interair Services, Inc., 3 NTSB 1715, 1718 (1979). Respondent claims that the Administrator's order here is nonetheless defective because it is signed by a staff attorney from the Office of the Assistant Chief Counsel for the Eastern Region. We agree with the Administrator that the mere fact that the Regional Counsel's title has been changed to Assistant Chief

Counsel for the Region does not render an otherwise valid order fatally defective.

---

asking him to compel the Administrator to comply with his discovery request. Only then would the preclusion of evidence be appropriate, if the Administrator failed to comply or otherwise explain his reasons to the law judge. Similarly, respondent's claim that one of the witnesses should not have been allowed to testify because he failed to appear for a deposition is also without merit.(f.n.10) Respondent fails to articulate any prejudice arising from his inability to depose the witness before hearing. If he was unprepared to cross-examine the witness on the day of the hearing the appropriate remedy would have been to request a continuance.

Finally, respondent asserts, without explanation or argument, that the sanction of revocation is excessive. We disagree. Respondent violated several sections of the Federal Aviation Regulations. He transported parachutists in an unairworthy aircraft, and in complete disregard of a condition notice which was served on him by one of the Administrator's inspectors. The evidence of record amply establishes that respondent lacks the care, judgment, and responsibility to hold any airman certificate.

---

10. Respondent did not follow the Board's rules in that he did not serve a copy of the subpoena on the Administrator. We fail to understand how under such circumstances respondent can in good faith argue that the Administrator should be sanctioned by the preclusion of that

witness' testimony, when the Administrator had no notice that the witness, who is not a Federal employee, had been subpoenaed for the deposition.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. That Administrator's revocation order and the initial decision are affirmed; and

3. The revocation of respondent's commercial pilot certificate shall commence 30 days from the date of service of this order.(f.n.11)

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

---

11. For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).